IN THE

SUPREME COURT OF MISSOURI

No. SC92682

REVA BILLINGS and WILLIAM MORRISON,

Appellants,

vs.

DIVISION OF EMPLOYMENT SECURITY,

Respondent.

Appeal from the Labor and Industrial Relations Commission

APPELLANTS' SUBSTITUTE BRIEF

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SUMMARY OF THE ARGUMENT

In this case of first impression under federal law, the Commission misapplied the law to the undisputed facts in denying Billings' and Morrison's applications for Trade Act assistance. Both are among 800 Western Union workers who lost their jobs as a result of the outsourcing of their work to a foreign country. The United States Department of Labor determined that those of this group of workers who were separated from employment on or after July 15, 2008 are eligible to receive federally-funded Trade Act weekly allowances and training.

When they reported to work on July 3, 2008, Billings and Morrison were taken aside, Billings was told that she would be laid off on July 20, 2008, and Morrison was told that he would be laid off on August 7, 2008. Both were told that they would remain on the regular payroll until they were laid off, told to turn in their badges, excluded from their usual work areas, and released to return home. Though they were never again assigned their usual duties, they remained on call, subject to company rules, and ineligible for unemployment compensation until they were laid off.

In holding that July 3rd, not the dates of the layoff, was the last day of work, and thus, the date on which they were separated from employment, the Division failed to construe the Trade Act and its implementing regulations liberally so as to carry out the purpose of the act, to assist workers harmed by foreign competition, in violation of 20 C.F.R. § 617.52(a) (2012). Alternatively, the holding that the notice period, the time after they were given notice and before the dates of the layoff, was not an "employer-authorized leave of absence,"

because they had no expectation of returning to work, is not a liberal construction and application of the Act. For these reasons, the Commission's decisions should be reversed.

JURISDICTIONAL STATEMENT

I. Nature of Proceeding

This is an appeal from orders, mailed on March 18, 2011, of the Labor and Industrial Relations Commission ("Commission") denying the Appellants' claims for Trade Readjustment Allowance or Trade Adjustment Assistance. [Legal File at p. ("L.F.") 17 (Appendix p. ("A") 1), 41 (A10)].

II. Perfection of Appeal

These orders became final on March 28, 2011. Section 288.200.2, R.S.Mo. (2000). As required by Section 288.210, R.S.Mo. (2000), within twenty days, Appellants filed with the Commission a notice of appeal to the Court of Appeals: Reva Billings ("Billings") filed hers by mailing it on April 5, 2011 [L.F. 19, 21]; William Morrison ("Morrison") mailed his on April 18, 2011 [L.F. 43, 45]. The notices are deemed filed when postmarked, Section 288.240, R.S.Mo. (2000), the same dates they were mailed. In compliance with Section 288.210, on June 13, 2011, the Commission filed the record on appeal, which is comprised of a legal file and a transcript.

III. Jurisdiction

As there is no issue involving the validity of any statute nor is there any other issue within the exclusive appellate jurisdiction of the Supreme Court of Missouri, this appeal was within the general appellate jurisdiction of the Court of Appeals. Mo. Const. Art. V, § 3.

The Court of Appeals filed its opinion on May 9, 2012. In compliance with Rules 84.17(b) and 83.02, on May 24, 2012, Billings and Morrison timely filed, in the Court of Appeals, a motion for rehearing and an application for transfer. After the Court of Appeals denied these motions, on June 25, 2012, Billings and Morrison, on July 10, 2012, pursuant to Rule 83.04, timely filed in this Court an application for transfer, which this Court granted.

STATEMENT OF FACTS

I. Mass Layoff

Western Union Financial Services ("Western Union") closed its call center in Bridgeton, Missouri ("Call Center"), on or soon after August 6, 2008. [*E.g.*, Vol. 3 of Transcript at p. 473 ("T. 473 (Vol. 3)"); T. 136 (Vol. 1); T. 792 (Vol. 4); T. 847 (Vol. 5)]. It moved the work performed there to a foreign country. [T. 16-17 (Vol 1); T. 227 (Vol. 2); T. 656-58 (Vol. 4)]. In the weeks leading up to August 6th, at various times, it laid off all 800 workers who had worked at the Call Center. [T. 473 (Vol. 3); T. 792 (Vol. 4); T. 18-19, 136, 161-62, 176, 183, 195-96 (Vol. 1); T. 205, 211, 217-18, 226, 232, 237-39, 245, 259, 264, 272, 277, 284, 290, 295, 303, 309, 316, 328, 335, 341, 351, 354-56, 364, 369, 375, 381 (Vol. 2); T. 516, 560, 592 (Vol. 3); T. 607, 655, 705 (Vol. 4); T. 836, 845-46, 855, 867, 874, 967 (Vol. 5)].

II. Trade Act Certification

Sometime later, the union which represented the Call Center workers filed a petition with the United States Department of Labor ("Department of Labor") seeking a certification that they had been adversely affected by foreign competition, so that each, then, might apply

for monetary and other benefits available to such displaced workers under certain provisions (*See*, 19 U.S.C. § 2271-2322 (2006)) of the Trade Act of 1974 ("Trade Act"). [T. 16-17, 29, 136 (Vol. 1); T. 284 (Vol. 2); T. 657-58 (Vol. 4); T. 822-24 (Vol. 5)].

After conducting its investigation, the Department of Labor made the following certification:

> there has been an acquisition from a foreign country by Western Union Financial Services of services like or directly competitive with those supplied by [the Call Center workers].
>
> . . . .
>
> *all [Call Center] workers . . . who became totally or partially separated from employment on or after July 15, 2008 . . . are eligible* to apply *for adjustment assistance under* Chapter 2 of Title II of *the Trade Act* of 1974 as amended.

[T. 658 (Vol. 4); (A29)(emphasis added)].

III. State Administration of Claims

Although the Trade Act's adjustment assistance is a program of the federal government [T. 87 (Vol. 1)], the processing of the claims of individual workers is delegated to the states. [T. 15, 107 (Vol. 1); T. 656 (Vol. 4)]. *See also, e.g.*, 20 C.F.R. § 617.50-617.52 (selected portions are included at A21-22). After the Department of Labor issued its certification, the Missouri Division of Employment Security ("Division") notified the former Western Union employees of the Department of Labor's determination and advised them that

they might be entitled to Trade Adjustment Assistance ("TAA"), such as training and job search assistance, and weekly Trade Readjustment Allowances ("TRA"). [*See, e.g.*, T. 656 (Vol. 4)(A29)]. The Division advised the workers that, if they wished to receive benefits under this program, they must file with it a claim for determination of their eligibility. [T. 656 (Vol. 4)(A29)].

IV. Initial Denial of Claims

Billings had worked for Western Union for more than nineteen years and Morrison for more than seventeen years before they lost their jobs when the Call Center closed. [T. 136 (Vol. 1); T. 284 (Vol. 2)]. Both filed claims with the Division for TAA and TRA benefits. [T. 390-93 (Vol. 2); T. 659-662 (Vol. 4); L.F. 1, 22]. A deputy of the Division denied both Billings' and Morrison's claims, finding that they were ineligible, because they had lost their jobs too soon. [L.F. 2, 23]. Billings then participated in an appeal hearing, conducted by telephone [T. 351 (Vol. 2)], which did not change the deputy's denial of her claim [L.F. 3]. Both Billings and Morrison then appealed to the Division's Appeals Tribunal. [L.F. 3-5, 24-29].

V. Appeals Tribunal

A. Joint Hearing

On behalf of the Appeals Tribunal, a referee conducted a hearing at which thirty-one *pro se* claimants, including Billings and Morrison, participated; the referee conducted most of the examination of the witnesses and rendered the decisions on behalf of the Tribunal. [T. 1-200 (Vol. 1); T. 201-350 (Vol. 2); T. 814-87 (Vol. 5) and exhibits

included in the transcript volumes 2-5; L.F. 6-13, 30-37]. At the hearing, the following evidence was adduced.

B. Call Center Workers

With the exception of one person who had worked for Western Union in St. Charles [T. 237 (Vol. 2)], all of the claimants, including Billings and Morrison, had worked at the Call Center. [T. 136, 144, 161, 175, 183, 194 (Vol. 1); T. 205, 210, 216, 225, 231, 244, 259, 264, 271, 277, 284, 290, 294, 303, 308, 316, 327, 334, 340 (Vol. 2); T. 836, 845, 855, 866, 874 (Vol. 5)]. Billings was an international operator and Morrison a customer service operator. [T. (Vol. 1) 136; T. (Vol. 2) 284].

C. Notice of Layoff

On July 3 and 4, 2008, when they reported for work at the Call Center, twenty-one of these claimants, including Billings and Morrison, were taken aside and advised that they would be laid off in the later part of July or in early August. [T. 136 (Billings), 161-162, 176, 195 (Vol. 1); T. 205-06, 211, 226, 232, 245, 259, 264, 272, 284 (Morrison), 295, 303, 316, 328 (Vol. 2); T. 836, 855, 867, 874 (Vol. 5)]. Their badges were collected and they were excluded from their regular work area. [*E.g.*, T. 264-65 (Vol. 2)]. The collective bargaining agreement between Western Union and the union required Western Union to continue to employ these workers for at least fifteen days after giving them notice of its intention to lay them off. [T. 361-62, 365 (Vol. 2)]. Each worker was given a personal letter that, with only slight variations, stated this:

> [Y]our position . . . is being eliminated. *Your last day worked*

is today, and you will be paid a notice period between 7/5/2008 and 8/06/08. You will be placed on Furlough Force Reduction (FFR) effective on 8/7/2008.

[T. 162 (Vol. 1); T. 284, 355, 364, 375, 381 (Vol. 2); T. 474, 516, 560 (Vol. 3); T. 607, 705, 745 (Vol. 4); T. 967 (Vol. 5)(emphasis added)(an example of this letter is included in the Appendix at A27]. The only material difference in the letters was that for some, like Billings, the notice period ended on July 19th [C*ompare* T. 136-37 (Vol. 1), T. 364 (Vol. 2), and T. 351 (Vol. 2) *with, e.g.*, T. 364 (Vol. 2)], and for others, like Morrison, it stretched until August 6th [C*ompare* T. 284-85 (Vol. 2) and T. 655 (Vol. 4) *with, e.g.*, T. 355 (Vol. 2)].

D. **Notice Period Duties**

After receiving and signing the furlough force reduction letters on July 3rd or 4th, the workers were sent home, were not assigned any of their usual work during the next weeks, and did not return to the Call Center. [*E.g.,* T. 284 (Vol. 2)]. Billings and Morrison, like the other workers, continued to receive their regular pay as full-time employees until the end of the notice periods. [T. 136-38 (Vol. 1); T. 284-85, 351 (Vol. 2)(A27); T. 655 (Vol. 4)(A28)]. During this time, they were subject to being called in to work. [T. 200 (Vol. 1)]. They were still required to observe Company rules and regulations. [T. 361-62 (Vol. 2)]. These included a prohibition against working for any competitor and an obligation to refrain from public disparagement of the company. [T. 248-49 (Vol. 2)]. And, because they were still in the employ of Western Union, they were not eligible to receive unemployment compensation weekly benefits. [*E.g.*, T. 166-71 (Vol. 1)]. One of the other claimants did

apply during this time, but the Division denied her claim as premature. [T. 196-98 (Vol. 1)].

E. Vacation and Severance Pay

At the end of the notice period, these workers' status as full-time employees changed and they were then laid off. [*E.g.*, T. 351 (Vol. 2)(Billings)(A24); T. 655 (Vol. 4)(Morrison)(A25)]. Once laid off, each received payment for any accrued and unused vacation and one weeks' pay for each year of service. [*E.g.,* T. 866-68, 873-76 (Vol. 5)].

VI. Decisions of Appeals Tribunal

Rejecting claimants' arguments that they were not separated from employment until the dates, after July 15th, when, according to Western Union, they were laid off, the Appeals Tribunal denied Billings' and Morrison's appeals. [L.F. 6-13(A2-9); 30-37(A11-18)].

VII. Review by Commission and Appeal To This Court

Both Billings and Morrison then filed applications to have these decisions reviewed by the Commission. [L.F. 14-16, 38-40]. Without any hearing, argument, or briefing, the Commission allowed the applications, and, upon review, affirmed and adopted the decisions of the Appeals Tribunal. [L.F. 17, 41].

From the decisions of the Commission, Billings and Morrison now appeal to this Court. [L.F. 18-21, 42-45].

POINT RELIED ON

I.

THE COMMISSION ERRED IN DENYING BILLINGS' AND MORRISON'S CLAIMS FOR TRADE ACT BENEFITS, BECAUSE THE UNDISPUTED FACTS ARE THAT THEY WERE SEPARATED FROM THEIR EMPLOYMENT AFTER THE IMPACT DATE, IN THAT THE LAST DAY THEY WORKED WAS AFTER THAT DATE, OR, BECAUSE THE LAST DAY THEY WOULD HAVE WORKED, HAD THEY NOT BEEN ON EMPLOYER-AUTHORIZED LEAVES OF ABSENCE, WAS AFTER THAT DATE.

Santo v. Unemployment Compensation Board of Review, 130 Pa. Commw. 330, 568 A.2d 291 (1989)

Shultz v. Division of Employment Security, 293 S.W.3d 454 (Mo.App. E.D. 2008)

19 U.S.C. § 2291(a) (2006)

20 C.F.R. § 617.3 (2012)

20 C.F.R. § 617.52(a) (2012)

ARGUMENT

I.

THE COMMISSION ERRED IN DENYING BILLINGS' AND MORRISON'S CLAIMS FOR TRADE ACT BENEFITS, BECAUSE THE UNDISPUTED FACTS ARE THAT THEY WERE SEPARATED FROM THEIR EMPLOYMENT AFTER THE IMPACT DATE, IN THAT THE LAST DAY THEY WORKED WAS AFTER THAT DATE, OR, BECAUSE THE LAST DAY THEY WOULD HAVE WORKED, HAD THEY NOT BEEN ON EMPLOYER-AUTHORIZED LEAVES OF ABSENCE, WAS AFTER THAT DATE.

A. Standard of Review

This Court must reverse the Commission's decisions unless they are supported by competent and substantial evidence and are authorized by law. *E.g., Shultz v. Division of Employment Security*, 293 S.W.3d 454, 458-59 (Mo.App. E.D. 2008)(*citing, inter alia*, Section 288.210). All evidence adduced at the joint hearing of the Western Union workers must be considered in this appeal. Section 288.190.2, R.S.Mo. (2000). Though this Court views the evidence in the light most favorable to the Commission's findings, it must review questions of law *de novo*. *Id*. Because the Commission simply affirmed and adopted the findings of the Appeals Tribunal, this Court must "use those findings as the bases for reviewing the decision." *Adams v. Division of Employment Security*, 353 S.W.3d 668, 672 (Mo. App. E.D. 2011). Thus, appellants shall refer to the findings of fact and conclusions of law of the Appeals Tribunal as those of the Commission.

B. The Trade Act

The Trade Act provides two types of benefits available to workers displaced by import competition or a shift in production to another country:

> trade adjustment assistance (TAA), which includes 'counseling, testing, training, placement, and other supportive services,' 20 C.F.R. §§ 617.1(a), 617.2; and trade readjustment allowances (TRA), which are cash payments to supplement state unemployment insurance. 19 U.S.C. §§ 2291-2293; 20 C.F.R. §§ 617.1(b), 617.3(nn), 617.11.

Adams, 353 S.W.3d 668, 675 n.2. Once the Department (or Secretary) of Labor issues a certification that a group of workers have been adversely affected by foreign competition, the "workers within that group who meet certain standards of individual eligibility may then apply for and receive TRA benefits [and other trade adjustment assistance]." *UAW v. Brock*, 477 U.S. 274, 277 (1986). *See generally* 19 U.S.C. § 2291 (2006)(A19) *and* 20 C.F.R. § 617.50 (A21).

While all benefits and program administration costs are paid by the federal government, the Secretary of Labor has delegated all individual eligibility decisions and benefit administration to the states. *E.g., UAW v. Brock*, 477 U.S. at 277-78. Though review of these eligibility decisions are in accord with state procedures, "state authorities are bound to apply the relevant regulations promulgated by the Secretary of Labor and the substantive provisions of the [Trade] Act." *Id.*, 477 U.S. at 278 (*citing* 29 C.F.R. § 91.51(c) (1985)). In

doing so, the states must construe the Trade Act and the regulations which implement it "liberally so as to carry out the purpose of the Act." 20 C.F.R. § 617.52(a)(A22). "The Act's purpose is to assist workers who have been adversely affected by import competition in returning to suitable employment." *Shultz*, 293 S.W.3d at 456. *See also* 20 C.F.R. § 617.2 (A19) ("increased imports"). *Cf.* 19 U.S.C. § 2272(a)(2)(B)(i)(I) (2006)("there has been a shift by such workers' firm to a foreign country in . . . the supply of services like or directly competitive with . . . services which are supplied by such firm. . . ."). The states also must construe the Act and regulations so as to achieve "uniform interpretation and application . . . throughout the United States." 20 C.F.R. § 617.52(b) (A22).

C. Impact Date

The date specified in the Secretary of Labor's certification, as the date on which a significant number or proportion of workers were adversely affected, is referred to as the "impact date." 20 C.F.R. § 617.3(v)(A19-20); 29 C.F.R. § 90.16(d)(2) (2012) (A22-23). The Department of Labor's certification stated that Western Union's Bridgeton, Missouri employees "who became totally . . . separated from employment on or after July 15, 2008 . . . are eligible to apply for adjustment assistance. . . ." [*Compare* L.F. 7 and 31 *with* T. 657-58 (Vol. 4)(A28-29)]. The Commission denied Billings' and Morrison's applications for Trade Act benefits, holding that they were ineligible, because it found that they had been separated from employment before July 15th. [L.F. 6-13(A2-9); 30-37(A11-18)].

D. Date of Separation

The Commission quoted 20 C.F.R. § 617.3 (A19-20), the regulation that defines "date of separation," which, in pertinent part, states this:

> . . . .
>
> (l) Date of separation means:
>
> (1) With respect to a total separation –
>
> (I) For an individual in employment status, the last day worked; and
>
> (ii) For an individual on employer-authorized leave, the last day the individual would have worked had the individual been working. . . .

[L.F. 9 (A5), 33 (A14)].

E. Ambiguous and Incomplete Findings

The Commission's analysis is erected on the shaky foundation of these implicitly contradictory findings of fact:

> *[Billings] last worked* as an International Operator *on July 3, 2008. At that time the claimant was laid off.*
>
> . . . .

> The claimant received a letter from Western Union . . . verifying the *claimant was laid off on July 20, 2008*. The letter is admitted into evidence as claimant's Exhibit 1.

[L.F. 6 (A2)(emphasis added)]. The Commission's decision denying Morrison's claim suffers from the same ambiguity. [L.F. 30 (A11)]. Because the third sentence of these findings simply recites what certain evidence purports to prove, rather than what the facts are, it is not a precisely stated finding of fact. And, yet, there is nothing to indicate that the Commission made any determination of the credibility of the letter. The Commission simply stated one conclusion for which there was absolutely no evidence, that Billings and Morrison were "laid off" on July 3, 2008, [*e.g.*, T.136-37 (Vol. 1); T. 284-85, 351 (Vol. 2)(A24); T. 655 (Vol. 4)(A25)] and noted that Western Union had "verif[ied]" that this was untrue.

Such contradictory findings lend no support to the Commission's decisions that Billings and Morrison were separated from their employment on July 3rd and were not on any employer-authorized leave thereafter. Section 288.210.

Though evidence of what transpired between the date when Western Union gave Billings and Morrison notice and the dates when they drew their last regular pay (the "Notice Period"), was uncontroverted, the Commission made no findings whatsoever of these relevant facts. Between July 3rd and the layoff dates (July 20th for Billings and August 7th for Morrison) the claimants received their regular wages [T. 351 (Vol. 2)(A24); T. 655 (Vol. 4)(A25)]. During this time, neither Billings nor Morrison was asked to report to work at the Call Center and neither was assigned any of her/his usual job duties [T. 136-37 (Vol. 1); T.

284 (Vol. 2)]. Until they were laid off, they were subject to being called in to work [T. 200 (Vol. 1)], they continued to be subject to the rules and regulations governing Western Union employees, including the prohibitions against working for Western Union's competitors and against disparaging the company [T. 248-49 (Vol. 2)], they were ineligible for unemployment compensation [T. 197-98 (Vol. 1), and they were not yet eligible to receive payment for accrued and unused vacation pay and for severance pay due to employees who have been laid off [T. 875-76 (Vol. 5)].

F. Irrelevant Facts

The Commission's conclusions of law run astray by mixing in vague references to irrelevant facts concerning furloughs, vacation pay, and severance pay in this fuzzy conclusion:

> Furlough force reduction, vacation pay, severance or notice pay does not extend the claimant's 'employment' after the impact date of July 15, 2008. Furlough force reduction, vacation pay, severance or notice pay are not employer authorized leave under the statute or under the regulations.

[L.F. 12 (A8), 36 (A17)]. The Court of Appeals also muddled the issues by approving this unfocused analysis. [Memorandum, p. 8 (A39). Billings' receipt of vacation pay and severance pay after she was laid off on July 20th and Morrison's receipt of vacation pay on or after August 7th [*e.g.*, T. 351 (Vol. 2); T. 655 (Vol. 4); T. 875-76 (Vol. 5)], are irrelevant to the questions of whether they were working or on leave during the notice period. Because

Billings was not placed on furlough until the end of the notice period on July 20th [*compare* T. 136-37 (Vol. 1) and T. 351 (Vol. 2) *with* T. 364 (Vol. 2)] and Morrison was furloughed on August 7th [*compare* T. 284-85 (Vol. 2) and T. 655 (Vol. 4) *with, e.g.*, T. 355 (Vol. 2)(A27)], there is no need to consider whether these furloughs affected the determination of the dates on which Billings and Morrison were separated from employment. The only issue is whether Billings and Morrison were separated from their employment before the end of the notice periods.

G. Last Day Worked

The Commission concluded that "notice pay does not extend the claimant's 'employment' after the impact date of July 15, 2008." [L.F. 12 (A8); L.F. 36 (A17). But, it neglected to explain what evidence it considered or how it reached this conclusion.

First, we must consider whether Billings and Morrison were "in employment status," as that term is used in 20 C.F.R. § 617.3(l)(1)(I) [A19-20], from July 3rd through their layoff dates in late July and early August. The regulation broadly defines "employment" to include "any service performed for an employer by . . . an individual for wages." 20 C.F.R. § 617.3(o) [A19-20]. It also provides that "[l]ayoff means a suspension of or separation from employment by a firm for lack of work, initiated by the employer. . . ." 20 C.F.R. § 617.3(z) [A19-20]. Read together, it appears that "layoff" implies that the employee has ceased to provide any services and ceased to receive regular wages. And, these definitions imply that "employment" contemplates the continued payment of regular wages for "any service." In light of these definitions, we must conclude that Billings was "in employment status" between

July 3rd and July 20th when her regular wages ceased and she was laid off and that, likewise, Morrison was "in employment status" through August 7th.

The Court of Appeals incorrectly cited Missouri statutes which define terms such as "employment" and "wages" in its analysis of when Billings and Morrison last worked for Western Union. [Memorandum, p. 6 (A37)]. Such state substantive law must be disregarded, for the reason that the Trade Act and its regulations must be construed by themselves, so as to achieve "uniform interpretation and application . . . throughout the United States." 20 C.F.R. § 617.52(a) and (b) (A22). For example, in *Nelson v. Commissioner of Employment and Economic Development*, 698 N.W.2d 443, 448 (Mn.App. 2005), the court denied Trade Act benefits to a worker who was locked out of work, due to a strike. It rejected the worker's argument that, under state law, he must be considered at work during the lock out. *Id*. The court explained that, while state procedural law governs the claim process, state substantive law on questions of eligibility does not control. *Id*.

So, then, we must ask: when was "the last day [each] worked"? The Commission answered this question by focusing on one consideration not mentioned in the regulations or in any other authority to which it cited: the "last *physical* day of work. . . ." [L.F. 9 (A5); L.F. 33 (A14)(emphasis added)]. Likewise, the Court of Appeals also focused on this invented requirement. [Memorandum, p. 7 (A38)]. The Commission, as well as the Court of Appeals, neglected to consider whether the facts that Billings and Morrison remained on the regular payroll [T. 136-38 (Vol. 1); T. 284-85, 351 (Vol. 2)(A24); T. 655 (Vol. 4)(A25)], were on call (T. 200 (Vol. 1)], and were still subject to company rules, such as the non-compete and non-

disparagement requirements [T. 248-49 (Vol. 2)], had any bearing on this question. [Memorandum, pp. 2 (A33), 3 (A34), 7 (A38)]. Though the services of remaining on call, of refraining from working for a competitor, and of refraining from disparaging Western Union are not so onerous as reporting to the Call Center for five eight-hour shifts each week, we cannot say that Billings and Morrison were not providing "any service" for the wages they received during this notice period.

Though Western Union's collective bargaining agreement obliged it to give its workers at least fifteen days notice of its intention to lay them off [T. 361-62, 365 (Vol. 2)], and though it did give such a notice to Billings and Morrison on July 3rd [T. 136 (Vol. 1); T. 284 (Vol. 2)], it was free, as any employer is, to determine what, if any, duties to assign to them during the notice period. That Western Union decided, for whatever reasons, to send them home on July 3rd and, though they were being paid their regular hourly wages, not to call them back to perform their usual duties, does not mean that they were not working. They were doing what Western Union required of them by following its directions. Billings and Morrison were "working" by being on call and by abiding company's rules, including the non-compete and non-disparagement requirements. *Cf. Talberg v. Commissioner of Economic Security*, 370 N.W.2d 686, 690 (Mn.App. 1985)(miners who were not required to report to the job site but who remained on call during work slow down and who later were paid for their scheduled July vacation were not separated from their employment until they completed their vacation and were laid off).

The Commission's conclusion to the contrary is at odds with the requirement that

"[t]he [Trade] Act and its implementing regulations are to be liberally construed so as to carry out the purpose of the act." *Shultz*, 293 S.W.3d at 456 (*citing* 20 C.F.R. § 617.52(a)(A22)). Never mentioning the mandate that the Act be liberally construed, the Court of Appals makes the same mistake. [Memorandum, pp. 5-7 (A36-38)]. Because "[t]he Act's purpose is to assist workers who have been adversely affected by import [or other foreign] competition in returning to suitable employment," *Id*. (citations omitted), and there can be no doubt that Billings and Morrison were so affected, the Commission's strict interpretation of what it means to work must be reversed.

In *Eastman v. Ohio Board of Employment Services*, 67 Ohio App. 3d 318, 324, 586 N.E.2d 1185, 1189 (1990), *appeal dismissed*, 55 Ohio St.3d 722, 564 N.E.2d 499 (Ohio 1990), the court considered whether claimant made a timely application for TRA benefits where he had had several temporary layoffs. It noted that, "because the Trade Act is remedial in purpose, eligibility requirements are to be liberally construed," and because "long-term employees . . . are precisely those Congress sought to assist," it would be improper to conclude that claimant was separated from employment until the last day of work before his final and permanent layoff. *Id*.

In *Williams v. Board of Review*, 350 Ill.2d 352, 369, 948 N.E.2d 561, 572 (2011), the court applied the doctrine of equitable tolling to extend the deadline for a worker to apply for Trade Act benefits, because she was not notified of her eligibility to apply. It explained that this was a liberal construction of the Act which furthered its remedial purpose. *Id*.

Employment Department v. Furseth, 140 Or.App. 464, 470, 915 P.2d 1043, 1047

(1996), held that application of the doctrine of equitable estoppel to prevent denial of benefits to a worker misinformed by the state "is consistent with the Act's stated requirement of liberal construction so as to carry out its purpose."

A liberal interpretation of the regulations leads to the opposite conclusion than that reached by the Commission. By refraining from competing with and disparaging Western Union and by remaining on call, Billings and Morrison were providing services to their employer. So, the last day they worked was not July 3rd, the day they last reported to the Call Center, but days (July 20th for Billings and August 7th for Morrison) after the impact date, when they stopped getting their regular wages and were laid off.

H. Employer-Authorized Leave

Unlike its bald conclusion that Billings and Morrison did not work after July 3rd, because they were never again physically present at the Call Center, the Commission did offer some explanation of why it concluded that Billings and Morrison were not on an "employer-authorized leave" after this date. [L.F. 11-12 (A7-8); L.F. 35-36 (A16-17)]. But its analysis is undermined by its misunderstanding of the uncontroverted facts. It wrote that "[t]he fact that the employer gave the claimant 'furlough' until a date after July 15, 2008 . . . does not change the last date of work or the conclusion." [L.F. 11 (A7); L.F. 35-36 (A16-17)]. But, such is not the fact. The letters which Western Union gave the workers on July 3rd said that they would be furloughed not then, but rather at the end of the notice period. [*See, e.g.*, T. 355 (Vol.4)(A27)].

Even if we assume, *arguendo*, that the Commission believed it fair to describe the

fifteen-day (or longer) notice period as a "furlough," its conclusion that this notice period was not an "employer-authorized leave" is in error. Though it conceded that a "furlough" is defined as a "leave of absence," [L.F. 12 (A8); L.F. 36 (A17), it declared, without citation to any regulation or other authority whatsoever, that "[i]nherent in a leave of absence is an expectation of return." *Id*. The Court of Appeals approved this analysis. [Memorandum, pp. 7-8 (A38-39)]. Such a conclusion fails to interpret and apply the regulations liberally, so as to assist workers who have been adversely affected by foreign competition. *Shultz*, 293 S.W.3d at 456.

In *Santo v. Unemployment Compensation Board of Review*, 130 Pa. Commw. 330, 331-34, 568 A.2d 291, 292-93 (1989), the court considered whether steelworkers who last worked on a Friday were on an employer-authorized leave the next day. Noting that the employer's policy was an employee was not considered laid off until Sunday of the next work week following the employee's last day of work, the court held that the workers were on an "employer-authorized leave" on Saturday, because employees sometimes were required to work an unscheduled Saturday. *Id*. It explained that this expansive interpretation of what an "employer-authorized leave of absence" was necessary "to fulfill the remedial purposes of the [Trade] Act. . . ." *Id*., 130 Pa. Commw. at 334, 568 A.2d at 293. Unlike the Commission, the *Santo* court never considered whether there was any possibility or expectation that the workers would ever return to work. *Id*. Our facts are more compelling. In *Santo*, there is no mention that the workers were paid for their time during the leave, as Billings and Morrison were. *Id*.

The Commission's reliance on *Figas v. Labor and Industrial Relations Commission*, 628 S.W.2d 731 (Mo.App. E.D. 1982), the only case it cited in its consideration of what is an "employer-authorized leave," is misplaced. In *Figas*, the employee was laid off on March 26, 1979, but, thereafter received accrued vacation pay until May 12, 1979. *Id*. The court rejected his contention that he was not separated from employment until he got his last vacation payment. *Id*, at 732. It reasoned that he "performed no service for [his employer] for wages" after he was laid off. *Id*. Our facts are different. Here Billings and Morrison were not laid off, were paid their usual wages, and continued to perform some, albeit less than their usual, services until after the July 15th impact date. [T. 136-38, 200 (Vol. 1); T. 248-49, 284-85, 351 (Vol. 2)(A24); T. 655 (Vol. 4)(A25)]. They did not receive their accrued vacation pay until they were laid off sometime after July 15th. [*E.g.*, T. 866-68, 873-76 (Vol. 5)].

For these reasons, the Commission's analysis and discussion of furloughs completely misses the mark and must be disregarded.

I. Last Day Billings and Morrison Would Have Worked

Rejecting any contention that Billings and Morrison were on any "employer-approved leave" after they were given notice on July 3rd, the Commission adds, without comment or explanation, that "there is no evidence the claimant could have worked after July 3, 2008." [L.F. 12 (A8); L.F. 36 (A17)]. This is not true. The undisputed evidence was that the Call Center was not completely shuttered until at least August 6, 2008 (T. 792 (Vol. 4); T. 847 (Vol. 5)], and that Billings and Morrison remained on call until they were laid off in

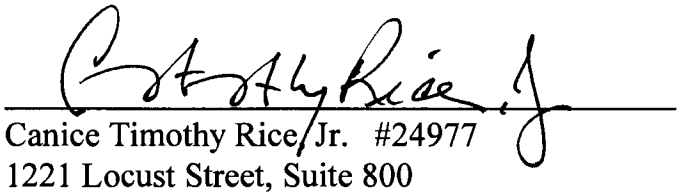
late July or early August. [T. 200 (Vol. 1)]. So, if Billings and Morrison were on leave during the notice period, then we must conclude that the last day they would have worked is the last day of the notice periods, a day on which they could have been called in to work.

For this reason as well, the Commission erred in concluding that Billings and Morrison were separated from employment before the end of the notice period.

CONCLUSION

For the foregoing reasons, the decisions of the Labor and Industrial Commission denying the Trade Act claims of Appellants Reva Billings and William Morrison should be reversed.

Respectfully submitted,



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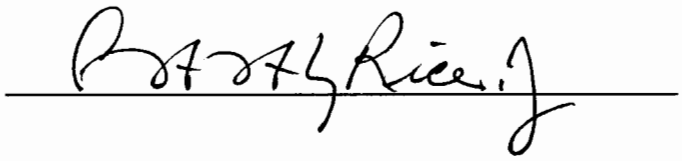
CERTIFICATE OF COMPLIANCE WITH
RULE 84.06(c)

The undersigned counsel of record hereby certifies that the foregoing brief includes the information required by Rule 55.03, was prepared in proportional typeface of 13 points, that the word processing system used to prepare the brief is WordPerfect X6 in Times New Roman, and that the brief contains 6,016 words as determined by the WordPerfect X6 word counting system.



CERTIFICATE OF SERVICE

I certify that a copy of Appellants' Substitute Brief and of the Appendix to Appellants' Substitute Brief were served by ECF Notice of Electronic Filing to Michael Pritchett and Shelly A. Kintzel, Attorneys for Respondent, 421 East Dunklin Street, P.O. Box 59, Jefferson City, Missouri, 65104, who participate in the ECF System, this 2nd day of November, 2012.